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January 11, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: July 16, 2004

Case No.: TIA-0142

XXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant's late father (the Worker) was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Worker did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. ' ' 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. ' 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program, and its web site provides extensive information concerning the program.¹

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that

¹ www.eh.doe.gov/advocacy

was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. ' 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act - Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. In addition, under Subpart E, an applicant is deemed to have an illness related to a work related toxic exposure at DOE if the applicant received a positive determination under Subpart B.

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Worker was employed at DOE's Idaho National Engineering and Environmental Laboratory. He worked at the site as a laborer/cement mason for nearly 29 years, from 1950 to 1979.

The Applicant filed an application with OWA, requesting physician panel review of two illnesses - leukemia and severe anemia. The Physician Panel rendered a negative determination on each of the claimed illnesses and explained the basis of each determination. The Panel agreed that the Worker had severe anemia and leukemia. However, the Panel determined, based on the limited records available to it, that there was no evidence of sufficient exposures to toxic substances which could have contributed to the Worker's illnesses.

The OWA accepted the Physician Panel's negative determinations and, subsequently, the Applicant filed the instant appeal.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to a toxic exposure during employment at DOE. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12.

In her appeal, the Applicant argues that the Physician Panel erred in determining that the Worker's illnesses were not related to his workplace exposures. The Applicant states that the Worker's medical records were destroyed. The Applicant also states that although the

Panel stated that the Worker died of heart failure, the Worker's leukemia was the main cause of his death.

The Applicant's arguments do not provide a basis for finding panel error. With regard to the Worker's cause of death, the Panel agreed that the Worker's anemia caused his death. The report cites the Worker's death certificate, which states that the Worker died of "heart failure secondary to severe anemia with blasts, variant of leukemia." See Panel Report at 1. With regard to the lack of medical records, the Applicant's argument does not indicate panel error. In making its determination, the Panel examined the entire record that was available. The Panel determined, on the basis of that record, that there was no evidence establishing a relationship between the Worker's illnesses and his occupational exposures. Therefore, the Applicant's arguments are mere disagreements with the Panel's medical judgment rather than indications of panel error.

In her appeal, the Applicant provides a letter from the National Institute for Occupational Safety and Health (NIOSH), dated after the Panel completed its report and OWA informed the Applicant of the Panel's determination, which indicates that NIOSH was in the process of completing the Worker's dose reconstruction report. The DOL will be able to consider this information when it reviews the Applicant's claim.

As the foregoing indicates, the Applicant's claim does not provide a basis for finding panel error and, therefore, should be denied. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of this claim does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0142 be, and hereby is, denied.
- (2) This denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: January 11, 2005